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In the Supreme Court of the United States

October Term, 1946.

No. 476

WESTERN AIRLINES, INC., a Corporation,
Petitioner,

vs.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt; JOAN NANCY BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

The petition and brief are replete with false statements. They are wholly unreliable to inform this Court as to the sole question involved upon the present application, which relates to an evidentiary ruling. Neither the doctrine of *res ipsa loquitur,* nor the sufficiency of the evidence to invoke it, nor the propriety of the court's instructions with reference thereto is involved.

This Court will not render advisory opinions and will confine itself to the questions presented to the Circuit

Court of Appeals. *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271; *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784; *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468; *Lanasa Fruit S. S. & Imp. Co., Inc., v. Universal Ins. Co.*, 302 U. S. 556, 58 S. Ct. 371. Therefore, we will proceed to make clear the issues as presented by the pleadings in both the trial court and the Circuit Court of Appeals.

II.

PLEADINGS, EVIDENCE AND INSTRUCTIONS

A. The Pleadings.

It is asserted throughout the petition and brief that the plaintiffs alleged only a cause of action under the doctrine of *res ipsa loquitur*. It is emphasized that the sole charge of negligence contained in the complaint is one under the doctrine of *res ipsa loquitur*. This is not true and, therefore, we desire to call attention to the charges of negligence contained in the complaint upon which the cause was tried below.

The complaint consists of two separate and distinct counts. The first count sets forth a cause of action on grounds of general negligence under *res ipsa loquitur* and is based solely upon that ground. The second count alleged negligence in general terms but not under the doctrine of *res ipsa loquitur*. Count two alleges negligence as follows:

> "That the defendant negligently and carelessly managed, maintained, operated and controlled said airplane and its said airline and its equipment and the conduct of said flight * * *" (R. 5).

This pleading was not attacked by defendant at any stage of the proceedings. There was no motion to make it more specific and certain.

The position of the plaintiffs was understood both by court and counsel and was made perfectly clear in the following colloquy at a pre-trial conference (R. 39):

"The Court: No, I am not asking you to elect; I am simply asking what your state of mind is.

Mr. DeParcq: My state of mind is this: that we will show the facts and circumstances surrounding this accident. We will then also offer expert evidence with reference to its cause in aid and in explanation of the factual background; and it will be our contention, I believe, when the evidence closes and the record is finished, that we have adduced sufficient evidence to permit this case to go to the jury on specific negligence. But certainly if not, then we may fall back on the doctrine of *res ipsa loquitur* in line with the *Loos* case.

"The Court: And so that the issues are about as I stated them a while ago?

Mr. DeParcq: That is right, your Honor."

B. The Evidence.

The accident out of which this wrongful death action arose occurred at about 1:22 a. m. on December 15, 1942, at approximately three miles southeast of Fairfield, Utah.

The airplane was a Douglas DC-3 manufactured in December, 1936, and a total of 14,773 hours of flying time had been logged for the airplane (R. 214). The plane was not only the oldest one in the service of the defendant but was four or five times older than any other plane owned and operated by the defendant during December, 1942 (R. 214). The operating statistics of the defendant establish that at and before the time of the accident the Western Airlines, with only about half the number of planes in service, was carrying a substantially larger payload with respect to passengers, mail and express, than in previous years (R. 213, 214).

All the evidence established that at the time and place of the accident the weather conditions were ideal for flying (R. 381). The government meteorologist testified that everything indicated stable air conditions and ceiling and visibility unlimited (R. 92, 93-96), not only at the time of the accident but for two days prior thereto (R. 103). The data for Fairfield at 1:30 a. m. indicated a stable air mass and winds only light to gentle (R. 66, 67). The defendant's records show an "easterly flow of dry stable air" and ceiling and visibility unlimited (R. 263, 264). One of the defendant's captains went over the same route at 11:29 p. m. and reported in his flight log that the air was smooth (R. 350, 351).

The accident was described in the deposition of Captain Gardner, a survivor of the crash. He was seated in the third seat from the front on the left side, just over the trailing edge of the left wing, and after a normal take-off he settled back and dozed off and was semiconscious (R. 122). He was awake enough so that he was aware of the stewardess walking back to the rear of the cabin at one time, and noticed that the "No Smoking" sign was turned off. There was nothing unusual until he was brought up sharply to keen awareness by a very sharp pull-up and maneuver of the airplane with a sudden acceleration in an upward direction (R. 123). He realized that there was something in the nature of an emergency (R. 123). He knew that commercial planes were not handled in that fashion except in case of emergency (R. 131). The pull-up was very sharp. He was caused to sit down heavily in his seat and had the sensation of his cheeks dropping and his mouth wanting to fall open and his ears sliding down the side of his head (R. 123). He could not have stood up (R. 123, 124). The pull-up continued for a few seconds, during which time he ripped open the curtain to look outside (R. 124). The

airplane started to shake as though beginning to stall; there was a noise in the vicinity of the left engine which sounded like a thump; the plane just nosed over gently and continued in a stalled attitude, shaking all the way and continuing in a mushing flight with a turn to the left until the point of impact (R. 124). It was in a skidding left turn (R. 124).

When he first became aware of the unusual maneuver the first thing he did was tighten his safety felt as far as it would go (R. 124). The plane seemed to descend without interruption in a skidding left turn (R. 125). There was a certain amount of shuddering throughout the aircraft (R. 126).

While Captain Gardner could not commit himself absolutely, yet he believed that the sign which says, "Tighten Safety Belts," was turned off a short time after the take-off (R. 129) and he did not observe it turn on again up to the time of the crash. The stewardess did not say anything or issue any warnings about tightening safety belts after the pull-up and before the crash (R. 131). Defense counsel conceded that it was only because Gardner jerked his belt tight that he survived the ordeal (R. 725). The pull-up was extremely abrupt (R. 131). When he looked out it was clear and the moon was shining and visibility and ceiling were generally unlimited (R. 132). The flight seemed to be smooth before the pull-up and he had no recollection of its being bumpy or of any down-drafts or up-drafts (R. 134). It was a matter of two or three minutes from the time of the pull-up until the impact. While the left engine seemed a little rough he could not be absolutely sure (R. 138).

It was established, in fact admitted by the chief pilot of the defendant, that there were only three possible causes of the accident, to-wit:

1. Either some maneuver by the crew members, or
2. Something defective with reference to the condition of the plane and its various parts, or
3. Weather conditions (R. 193).

The evidence overwhelmingly eliminated the weather as a probable cause. An investigation failed to disclose the presence of any other aircraft in the immediate vicinity of the accident at the time (R. 193-5). There was no evidence in the record of any contact or collision with any plane or object in the air (R. 195). In the opinion of the chief pilot the evidence pointed to a structural failure rather than some other cause (R. 195).

It appeared without dispute that the left wing tip and the right horizontal stabilizer failed in the air and that the plane was in the process of disintegrating before reaching the ground. Pieces of fabric and glass were found a distance of from 1,500 to 2,000 feet from where the plane came to earth (R. 58). Counsel for the defendant conceded that the fractures were such that they had to occur, in part at least, in the air (R. 59, 299).

While it was admitted that there was a structural failure in the air, yet there was no agreement, in fact a sharp dispute, as to what caused the structural failure. It was the defendant's position that the accident may have been caused by a flock of birds, another aircraft, an up-draft or down-draft, or some other emergency, not due to defective equipment, which confronted the pilots (R. 715, 716). The plaintiff, on the other hand, offered expert evidence to prove that the accident was caused by an unsafe, defective and dangerous right horizontal stabilizer, and this testimony will be discussed later (R. 339).

C. The Court's Instructions.

It is stated by petitioner that the trial court submitted the case to the jury solely under the doctrine of *res ipsa loquitur*. This likewise is not true. In fact, the court, after submitting the case under the doctrine of *res ipsa loquitur* and explaining that doctrine expressly said in its instructions (R. 760):

> "But that is not the only ground that the plaintiffs rely upon in these cases for recovery. It is claimed and charged in the complaint that there was negligence in the operation of the plane. By operation is meant the flight of the plane at that time as made by the pilot and co-pilot on the plane."

Thus it will be seen that neither court nor counsel interpreted the complaint as limiting the charges of negligence solely to the doctrine of *res ipsa loquitur*. It may be noted that there was no exception taken by either party to the court's charge (R. 777).

III.

THE ARGUMENT

A. No Question With Respect to Res Ipsa Loquitur Is Involved.

This Court in Rule 38, Section 5, has set forth the grounds which warrant a writ of certiorari and while the grounds are not controlling and do not limit the court's discretion, yet they are indicative of the reasons which will be considered of sufficient importance to invoke this Court's supervision. The order or judgment here under review is not final. While this is not fatal to jurisdiction, yet we believe the defendant should not be permitted to seek review of an evidentiary ruling of this character before it has been applied prejudicially to its interests.

We propose to demonstrate that none of the grounds or reasons which this Court has specified as warranting a writ of certiorari exist in the case at bar.

The defendant's brief is calculated to obscure rather than to clarify the questions raised by this petition. In the Circuit Court of Appeals the plaintiffs—respondents here—on page 9 of their brief stated that the sufficiency of the evidence to warrant the submission of *res ipsa loquitur* was not involved. In its brief, agreeing that the doctrine was not involved, the petitioner—defendant—on page 2 thereof stated:

> "As appellants indicate at page 9 of their brief, no question of specific negligence of the defendant was raised by any of the evidence presented. The case was submitted to the jury solely on the doctrine of *res ipsa loquitur*. The sufficiency of the evidence to warrant its submission to the jury is not involved in the present appeal. Despite this admission by the appellants, the brief at page 13 contains an argument as to the applicability of the doctrine of *res ipsa loquitur* to the present case. This argument appears to be entirely inapplicable, immaterial, and out of place."

A certified copy of the brief of the appellee, petitioner here, containing the above paragraph has been filed with the clerk of this Court. It will thus be seen that the petitioner here, now seeking to invoke the powers of this Court to determine the applicability of the *res ipsa loquitur* doctrine, took precisely the opposite position in the court below.

No question of conflict of laws has arisen or could arise at any stage of the proceedings. Both parties and the trial court agreed that the doctrine of *res ipsa loquitur* as established in the state of Utah was the governing law, whether substantive or procedural. The implications of the case of *Erie R. Co. v. Tompkins* were not involved. The parties have been and are now in en-

tire harmony that the governing law is that of the state of Utah.

Although the question is not here involved, we might observe that while the authorities are in conflict with reference to the application of *res ipsa loquitur* to a private plane where the passenger has access to the controls, yet they are uniform in applying the doctrine to a common carrier by air and its passenger where the aircraft is in scheduled commercial flight, and, admittedly, under the sole dominion and control of the defendant and its agents and servants, and where, as here, the accident is one which according to the testimony of the defendant's officials would not and should not happen if those having the ownership, inspection, maintenance and operation of the plane exercised the proper degree of care (R. 153).

Smith v. Pacific Alaska Airways, Inc., 89 F. (2d) 253;

Seaman v. Curtiss Flying Service, Inc., 247 N. Y. Supp. 251, 231 App. Div. 867;

Smith v. O'Donnell, 215 Cal. 714, 5 Pac. (2d) 690, 12 Pac. (2d) 933;

McCusker v. Curtis-Wright, Inc. (1933), 264 Ill. App. 502;

English v. Miller (Tex. Civ. App.), 43 S. W. (2d) 642;

Bramen-Johnson Flying Service, Inc., v. Thomson, 167 Misc. 167, 3 N. Y. Supp. (2d) 602;

Genero v. Ewing, 178 Wash. 78, 28 Pac. (2d) 116;

Fosbroke-Hobbes v. Air Work, Ltd., & British American Air Service, Ltd., 1938 U. S. Av. R. 194 (High Court of Justice, King's Bench Div., Dec. 21, 1936) (53 T. L. R. 254, 81 Sol. J. 80);

Malone, et al., v. Trans-Canada Airlines, 1942 U. S. Av. R. 144 (Dominion of Canada, Province of Ontario, Court of Appeals) (3 D. L. R. 369-1942).

In order to grant a writ in this case to discussand solve questions not raised or involved either in the rial court or in the Circuit Court of Appeals the Supeme Court would have to render a purely advisory opiion. This Court does not render advisory opinions and dtermines only real controversies of grave importace. *Muskrat v. U. S.*, 219 U. S. 346, 31 S. Ct. 250; *Kellr v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 45; *State of Alabama v. State of Arizona*, 291 U. S. 286, 54 S. Ct. 399; *Baltimore & Ohio R. R. Co. v. Intertate Commerce Commission*, 215 U. S. 216, 30 S. Ct. 86; *Ex Parte Siebold*, 100 U. S. 371, 398.

This Court does not review decisions or judgments based solely on questions of fact such as a ruling of the trial court or an instruction by the trial court. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849; *United States v. Johnston*, 268 U. S. 220, 45 S. Ct. 496.

B. The Circuit Court of Appeals Properly Held That the Trial Court Applied Erroneous Legal Standards in Rejecting Lee's Testimony.

There can be no possible dispute concerning the universal principle stated by this court in *Stillwell Mfg Co. v. Phelps*, 130 U. S. 520, 9 S. Ct. 601:

> "Whether a witness called to testify to any matter of opinion, had such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial, and his decision is conclusive unless clearly shown to be erroneous as a matter of law."

In accord the Tenth Circuit Court of Appeals held in *Clarke v. Hot Springs Elec. Light & Power Co., et al.*, 52 F. (2d) 612, that the trial court on a matter of this kind will be reversed only in the event of: (1) a plain

error of law or (2) a serious mistake of fact, or (3) abuse of discretion. The law of Utah is in harmony with the principles expressed by this court and by the Circuit Court of Appeals as will be established by the following authorities:

Wooton v. Dragon Consolidated Mining Co., 54 Utah 459, 181 Pac. 593;

Clark v. Los Angeles & Salt Lake R. Co., 73 Utah 486, 275 Pac. 582;

Carr v. Cranney, 24 Utah 193, 70 Pac. 853;

Olson v. O. S. L. R. Co., 24 Utah 460, 68 Pac. 148;

Wright v. Southern Pacific Co., 15 Utah 421, 49 Pac. 309;

Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654;

Coon v. Shields, 88 Utah 76, 39 Pac. (2d) 348;

Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 88 Utah 67, 39 Pac. (2d) 323;

Provo-River Water Users Ass'n v. Carlson, et al., 103 Utah 93, 133 Pac. (2d) 777.

The offer of proof which the trial court rejected will be found on page 339 of the record. It is quite lengthy and detailed, but the witness Lee, had he been permitted by the court, would have testified that in his opinion the right horizontal stabilizer was in a defective, unsafe and dangerous condition, and that otherwise it would not have failed. The plaintiff offered to prove by this witness that the defective condition of the right horizontal stabilizer was the cause of the accident and initiated the other sequence of events (R. 339). The offer of proof included the sequence of events and the reasons of the witness for his opinion. The opinion was to be based upon a close and personal inspection of the records, the wreckage of the plane, the photographs, the barograph card, and the testimony of Captain Gardner. The ex-

perience of the witness which qualified him to express the opinion was as follows:

He was an aviation mechanic in the employ of the Thompson Flying Service at Salt Lake City (R. 272). His interest in aviation started in 1927, and he had flown numerous types of planes, including multi-engine and twin-engine aircraft (R. 272). He had approximately 1,100 hours of flying in the air (R. 272). He had owned three planes of his own, and listed some twelve or thirteen types of planes he had flown (R. 303). He had experienced stalls and spins in the air and recovered therefrom (R. 307). He had done stunting and acrobatic flying (R. 308). He had handled planes under circumstances where he had put stress and strain on the wings and stabilizers (id.).

He had worked for Western Airlines for about eleven months as an apprentice mechanic and as a shop specialist (R. 273). While employed by the defendant he did general maintenance work on aircraft, including inspections and repairs (R. 275). Western Airlines changed his position from that of an apprentice mechanic to a shop specialist and gave him more responsibility (R. 306). The latter job required a knowledge of stresses and strains of materials. As a part of his work at Western Airlines he made inspections for the purpose of determining evidence of stress and strain on wings and stabilizers (R. 314, 315). Prior to his work with Western Airlines he had previous experience and training as a welder and a sheet metal worker, and was, therefore, transferred to the army school training work while at Western Airlines (R. 275). The work he was doing at the Thompson Flying Service was substantially the same and this was a licensed repair station under the C. A. A. and he worked on any type of a plane (R. 275).

The witness was familiar with the various parts and structures of an airplane with reference to their purpose

and function in flight (R. 280-283). He had studied the C. A. A. manual and the Western Airlines maintenance manual and a lot of literature pertaining to the operation, construction and maintenance of DC-3 equipment (R. 289). At Western Airlines it was a part of his work to make Nos. 1, 2 and 3 inspections on this equipment (R. 289). He made inspections to determine air worthiness.

The witness Lee had studied metals and had experience with heat treated alloy (R. 332). He had studied manuals with reference to the construction of the DC-3 (R. 333). He testified that he had studied load factors and structural aero-dynamics, and that given proper tools and equipment, he could determine how to construct a piece of alloy to produce certain resistance, and that he believes that he could figure out the weight stresses of a bridge (R. 338).

It appeared that in addition to his flying experience, work as a mechanic and general knowledge of aviation, he had studied aero-dynamics and had taken an adult course in the subject offered by the Civil Air Patrol at Salt Lake City. He had been a member of the school class for over two years, attending at least once a week for a two-hour period (R. 306). He did the very same work at Western Airlines that was done by mechanics with an AE license (R. 308, 309), and he had all the qualifications to obtain one but had never taken the examination (R. 310).

The exclusionary ruling of the trial court prevented the plaintiffs from offering evidence of the defective and unsafe condition of the plane. Such evidence was admissible under count two of the complaint which alleged, in part, that the defendant negligently maintained its plane and equipment (R. 5).

The proferred testimony was also admissible under the doctrine of *res ipsa loquitur* even though no other

count had been contained in the complaint. This was definitely held by the Utah Supreme Court in *Dearden v. San Pedro L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271, and *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 Pac. (2d) 254. In the former case, which is directly in point, the court said:

> "That the plaintiff averred and undertook to show a defective brake chain as evidence of negligence causing the collision, did not waive nor affect the presumption of negligence arising from the circumstances, which was in itself sufficient to show such negligence. A relevant fact may frequently be proved in several different ways. The circumstances from which the presumption referred to arose were evidence for plaintiff of the fact of defendant's negligence causing the collision. The evidence of a defective brake chain which the plaintiff produced was also some proof of such negligence, and was in aid of and not adverse to the presumption. Though he had failed in such proof, the presumption of negligence which had been shown to exist independent thereof was in no wise displaced nor weakened."

Significant here is Rule 43 (a) of the Rules of Civil Procedure which provides that the admissibility of evidence is governed by the rule applied in federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. The rule specifies, "In any case, the statute or rule which favors the reception of the evidence governs."

The principal objection urged against Lee's qualifications was that he did not have an AE license (R. 310). The trial court was under the impression that in order to qualify it would be necessary to have an expert engineer who had studied the effects of air at different angles and all that sort of thing (R. 296). The court labored under the error or misconception of law that, inasmuch as the plaintiffs relied upon *res ipsa loquitur*, expert evidence should not be received (R. 311). The objections made by

the defendant, and sustained by the Court, were based upon the theory that Lee did not have a license, had not flown DC-3 equipment, and had never been through an accident of this kind (R. 292-338).

Thus the ruling of the trial court was clearly shown to be erroneous as a matter of law. This is what was meant by the Circuit Court of Appeals in stating that the ruling was made under the wrong legal standard. It is thoroughly settled that the absence of a license in a particular field is not fatal to the qualifications of an expert witness. It is likewise thoroughly established that if the witness has gained his knowledge of the subject from study, observation and experience, it is not necessary that he be licensed by any particular board or bureau having jurisdiction over the field involved. The knowledge may be gained by study and study alone. It may be gained from experience and experience alone. It may be gained, as here, from a combination of both.

Fightmaster v. Mode, 31 Ohio App. 273, 167 N. E. 407;

Germania Life Insurance Co. v. Ross-Lewin, et al., 24 Colo. 43, 51 Pac. 488;

Muskeget Island Club v. Town of Nantucket, 185 Mass. 303, 70 N. E. 601;

State Line & S. R. Co. v. Phillips, 98 F. (2d) 651 (3 C. C. A.);

Lestico v. Kuehner, 204 Minn. 125, 283 N. W. 122;

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Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569;
Clark, et al., v. Horowitz, et al., 293 Pa. 441, 143 Atl. 131;
People v. Rice, 159 N. Y. 400, 54 N. E. 48;
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Kitchens v. State (Ala. App.), 14 S. (2d) 739;
Kentucky Public Service Co. v. Topmiller, 204 Ky. 196, 263 S. E. 706;
City Council of Montgomery v. Gilmer & Taylor, 33 Ala. 116, 70 Am. Dec. 562;
Selby v. Osage Torpedo Co., 112 Okla. 203, 241 Pac. 131;
Pearson, et al., v. Zehr, 138 Ill. 48, 29 N. E. 854;
Jones, Commentaries on Evidence, Vol. 3, Secs. 1314, 1315, 1316, 1318.

C. The Circuit Court of Appeals Properly Held That the Testimony of the Witness Welcher Was Admissible.

Captain Gardner testified that if the safety belt sign had been turned on during the emergency, and if there was a spot of illumination up there, he would have noticed it and that is his reason for saying it was off (R. 129, 130). He never again observed either sign turned on up to the time of the crash (R. 130). None of the crew came back into the cabin during the two or three minutes involved and the stewardess did not issue any warning about tightening safety belts (R. 130-131).

It will be recalled that Captain Gardner made such a complete recovery that he returned to his service in the Marines in the South Pacific (R. 120). Defense counsel concedes that Captain Gardner survived this awful ordeal because and only because he tightened his safety belt as tight as it would go (R. 725). It may well be that if a

proper warning had been issued to the other passengers so that they could have tightened their safety belts they, too, would be alive today.

The witness Welcher explained that for ten years before the accident he had noticed planes flying over his home and had heard those planes every day (R. 169, 173). He had been listening to the sound of the different planes and motors and that is what drew his attention to this plane (R. 170). He went to the scene of the wreckage the next day (R. 170). He testified to circumstances which would indicate that this particular plane must have been the one which he heard during the night. The time, the place, and the circumstances were such as to practically exclude any other probability. It should be recalled that an investigation was conducted by the Civil Aeronautics Administration, the War Department and the defendant, and no other aircraft was found to have been in the vicinity at the time and place involved.

Hence, if this plane were in trouble and the motors were being speeded up by those in charge in an effort to establish control of it at a time when it was five miles north of Fairfield, then it may well be that the pilots or the stewardess, or both, were guilty of negligence in failing to issue a warning to the passengers to tighten their safety belts. In any event, this testimony established merely a circumstance with reference to the time and place of the trouble that was proper to consider in connection with the general background.

Inasmuch as the Circuit Court of Appeals based the reversal here principally upon the exclusion of Lee's testimony, and not Welcher's, the matter does not assume any controlling importance.

IV.

CONCLUSION

There is here no great principle of law at stake—no need for its establishment or clarification. The authorities with reference to the qualifications of an expert witness present neither doubt nor conflict, and the only problem arises from the application of established principles to divers and varying fact situations.

The decision below neither establishes a new principle nor clarifies an old one. Its affirmance or reversal here likewise would do neither.

It is respectfully submitted, therefore, that this petition falls far short of presenting the special and important reasons for a writ of certiorari required by the rules of this Court.

Respectfully submitted,

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